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# COMMENTS ON MACEDONIAN DRAFT LAW ON FREE ACCESS TO INFORMATION

## 1. INTRODUCTION & EXECUTIVE SUMMARY

The Open Society Justice Initiative has reviewed the Macedonian Draft Law on Free Access to Information (hereinafter "Draft Law") dated September 2004[1]. We applaud this initiative addressing the critical need of a government to be open and transparent to its citizens and neighbors. Freedom of information laws are an essential component of responsive government that a citizenry can trust and that can serve as a repository of collective aspirations. In many important respects, the Draft Law furthers these goals. Most importantly, the Draft Law enshrines the presumption of public access to documents and information held by the government. It also creates a fairly comprehensive administrative and judicial framework to resolve disputes that may arise when someone requests access to information.

Commendable aspects of the Draft Law include that requesters do not have to state reasons for their requests, that the time frames are in line with international norms (15 days being around the average of laws currently in force world-wide), that, whenever possible, information should be released immediately, that there should be partial access to documents containing exempted information, that requests should be forwarded to the appropriate government bodies, that requests may be made in all the official languages of Macedonia and

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that where documents exist in more than one language, the requestor shall have a choice. In addition, a number of welcome provisions will greatly facilitate the implementation of the law, including the establishment of information officers and of a national commission to oversee compliance with the law, obligations on information holders to ensure good records management, and a developed reporting structure to enable internal monitoring of use of the law.

Yet the Draft Law ultimately will not honor fully the spirit of the public right of access to information unless it addresses several of the issues we discuss below, two of which merit special mention here. First, we propose structural changes to the Draft Law to ensure that (a) all key terminology is properly and consistently defined, and (b) overlapping, and sometimes inconsistent, provisions are harmonized. Second, the provisions on exceptions need to be tightened and further clarified to reduce ambiguity in their interpretation by information holders and, ultimately, administrative and judicial officers who may have to review any denials of access. We discuss these and related comments below.

Finally, we suggest that the drafters consider including in this legislation provisions that would:

- Require a right of access to information held by private bodies that perform public functions
- Impose on private bodies an obligation to publish information in the general public interest (*e.g.*, concerning risks of harm to health, safety or the environment) where necessary to protect citizens and consumers
- Place a duty on public officials to assist requesters in order to ensure that users of the law are guided through its provisions and assisted with the formulation of clear requests
- Provide protections for "whistleblowers" – those persons who in good faith release information about wrongdoing or a serious threat to health, safety, the environment or human rights – against any legal, administrative or employment-related sanctions [an elaboration of Article 34 of the current draft]
- Ensure that all relevant staff in the information–holders receive sufficient training to be able to apply the law in line with both the letter and the spirit of the right of access to information

## II. STRUCTURAL CHANGES

### A. Creation of a "Purpose of the Law" Section

The Draft Law should include a "Purpose of the Law" section that gathers in one area all related articles and provisions. In particular, we suggest that Article 1, paragraph 1, Article 2, Article 4, and Article 6 all be combined under the proposed Purpose of the Law section. In addition, with respect to Article 6, it may be significantly more helpful to change the language to:

> *All parties should interpret this law to ensure the public's right of access to information held by information holders. All grounds for denying the right of access must be narrowly construed.*

Drafting Article 6 in this manner would incorporate the spirit of the Article as currently drafted and provide some guidance as to how these key principles should be applied.

### B. Creation of a Definitional Section

In order to clarify the provisions of the Draft Law and to provide guidance as to the legislators' intent, the Draft Law should start with a definitional section. In this section, key terms should be defined. These key terms include: "information holder," "information requester," "official documents," "public information," and "personal information." This list is not intended to be exclusive.

### C. Consolidation of Grounds for Denying Access to Information

Pursuant to Article 1, the grounds for denying access to information may only be those established by this law. The Grounds (or "Bases" in this translation) for Denying Access to Information presently include not only Article 7, with its harm and public interest test, but other grounds to deny access to information, including those mentioned at Articles 20 and 24. We suggest combining all such articles in the same section to improve clarity of the law and, possibly, reduce redundant or inconsistent provisions.

## III. SUBSTANTIVE CHANGES

### A. Presumption of Openness

An access to information law must clearly establish that all information held by governmental bodies and other bodies performing public functions or receiving public funds should be in the public domain, unless it falls within the scope of one of the narrowly defined exemptions established by the law.

Articles 1, 4, and 5 of the Draft Law correctly imply a presumption of free access to public information. Article 4 furthers the presumption by guaranteeing that right to all and by forbidding any discrimination.

This presumption of openness is, however, undercut by the Draft Law's changing and confusing use of key terms. Article 1 talks about the right of free access to public information managed by information holders and it enumerates those persons falling within that category. Yet, Article 3 defines the term "public information" as "information recorded in any form, drawn up or received and held by public authorities." This term, which is not defined by the Draft Law, could be construed as narrower than Article 1's "information holder", which includes "legal and natural persons rendering public services." This inconsistent use of terms creates confusion as to the scope of the law. Article 4 furthers the confusion by guaranteeing access to "official documents held by public authorities." The law does not define "official documents." However, the law appears to only guarantee access to a subcategory of public information ("official documents") held by a subgroup ("public authorities") of information holders.

In addition, Article 3's definition of public information is problematic, as it excludes "documents under preparation" without making it clear exactly what this means. We recognize that if a public official is mid-way through writing a document, such as a report, or even a one-page note, it would not normally be released until it has been completed. However, a completed document should include all internal documents, even if they might be revised in future by the same or another public official. Article 3 should make clear what is meant by a "document under preparation," in order to prevent over-broad application of this potential exemption.

We recommend that the law be clearly worded to guarantee access to all information held by public bodies or bodies performing public functions and only subject to the limited exemptions as established in Article 7. As we suggest in the Structural Changes section above, key terms such as

official documents and public authorities should be defined to ensure a consistent and fair application of the law and should be used consistently throughout the text of the law.

### B. **Exceptions**

Limitations on the right of access should be narrowly defined. Article 7 seeks to protect interests recognized as legitimate by the Council of Europe.[2] Article 7 might usefully restate explicitly that the different bases it enumerates are the exclusive grounds for denying access to information. It is laudable that Article 7 contains in paragraph 3 both a harm and public interest test. However, as currently drafted, Article 7 risks overbroad interpretation because the harm test is positioned as supplementary to the primary grounds for withholding the information. Most public information relates to one or more of these interests and, as a result, there is a risk that requests for information will often be denied. We therefore recommend that Article 7 make clear that information may only be withheld if it would cause serious harm to one of the enumerated interests (national security, public interest, etc.), and following application of a public interest test.

We are also concerned that the interpretation of these exceptions will vary greatly among information holders. The Draft Law might benefit from a clearer and narrower definition of each of the enumerated bases [or grounds] for withholding information. The law should emphasize that the exemptions should be narrowly construed by all information holders, as well as by the administrative and judicial bodies reviewing a rejected request.

In a positive measure in paragraph 2, the law correctly provides for access to denied information "the moment the reasons for the denial cease to exist." This provision should be strengthened by providing for a process to ensure that this determination is made.

**Personal Information**: Article 9 deals with information of a personal nature. It correctly seeks to limit denials of access to "information of a personal nature." However, in order to ensure that this provision is construed narrowly, the law should provide some indication as to the meaning of "personal information." In addition, the term "unreasonably" is suggestive and vague. A better test may be to define what constitutes an "unreasonable disclosure." The Article 9 protection of privacy is further weakened by paragraph 2, which provides for information to be released if "the third party has effectively consented to the disclosure of the information." The term "effectively" is unclear (at least in the English translation) and should be clarified. Consistent with European

[2] Council of Europe, *Recommendation (2002) 2 of the Committee of Ministers to Member States on Access to Official Documents, and Explanatory Memorandum*.

standards on data protection, the data subjects should know how personal information will be used, and it should be clear when information provided to the public authorities might be released.

Furthermore, Article 9's protection of "personal information" appears to duplicate the interests protected under Article 7's "privacy and legitimate private interests" exception. If this is not the case, the Draft Law should clearly set out the different standards applicable to each category. It is recommended that protection of privacy be included in a separate article, as the harm test differs from that for other protected interests. In this case, personal information should also be subject to the provisions of Article 8, which provide for partial release of a document after exempted information has been severed (blacked-out or separated).

**Other Grounds for Refusing Access**: Article 20 allows an information holder to deny "vexatious" requests, requests which are "substantially similar" to ones already filed by the requester and requests which would "unreasonably divert its resources." All of these tests are largely subjective and would allow an information provider to deny a large number of requests. The first two cannot be squared with the principle of free access to information and should be removed from the law. As for the last ground, a better approach would be to require the information provider faced with such a situation to ask the requester to pay for part of the costs of obtaining the information. It would be necessary to establish a clear test for what constitutes a diversion of resources. For example, under the new UK law, no charges will be levied so long as the cost of gathering information does not exceed £600, or about €1000.

Finally, Article 24 allows an information holder to deny a request on the ground that "it does not possess the information requested" or that "the information requested has already been published." It is not clear how this first ground fits in with the information holder's obligation to forward the request to the appropriate information holder. A better approach may be to eliminate this as a ground for denial and, instead, to emphasize the duty of the information holder to forward the request. In addition, an information holder should not be allowed to deny a request because of prior publication. It is incorrect to assume that, because information has been published, the requester will have access to it. For example, a document published on the Internet will not be accessible by the majority of people in Macedonia who still do not have Internet access. Because the purpose of a law like this one is to provide access to information, a party requesting information should be provided that information, regardless of its prior publication.

### C. Requests for Information

The law sets out a comprehensive procedure for exercising the right to access information. It correctly allows for oral and written requests. However, as currently drafted, there is some confusion as to the requirements that must be met for oral or written requests, as well as to the duties of the information holders.

With respect to oral requests, Article 15 seems to indicate that the information holder must "enable insight" to the requested information within three days from the date of submission of the request. According to Article 5, "insight" means inspection of the original. Article 15 is silent as to other forms of access. It should specifically set out a right to obtain a copy of the requested information in the same time period as for "insight."

Article 16 and 17 seem to apply to written requests only. The Draft Law should, however, clearly indicate whether this is the case. If it is, then some of the provisions of these Articles should be extended to oral requests as well. This is the case, for example, of Article 17's first and second paragraphs, as well as Article 16.

With respect to Article 16, the requirement that the requester provide its name and postal address is justified because this information may be necessary to send the requested information to the requester. No similar justification exists to provide further data that might be used to identify the requester, and hence the obligation to provide his/her father's name seems superfluous [although we recognize that provision of such information might be standard in Macedonia]. Furthermore, when an "authorized" person submits the request, it must contain the name and postal address of "the person to which the information requested relates," as well as the name of that person's father. The purpose of these requirements is unclear. It may be that the submission of requests by an "authorized" person refers to an appointed representative requesting private data. If this is the case, it should be clarified. Otherwise, to the extent that these provisions in Article 16 may discourage requests for information, they should be eliminated.

Article 17 provides that the information holder must provide the requester who has submitted a written request with access to the information within 15 days from the date of submission of the completed request. Although this time frame appears reasonable, it is significantly longer than the three days applicable to oral requests. When an incomplete request is submitted, the information holder must "request the information requester to complete the request within 8 days." This law does not, however, indicate a time period in which the information provider must request that the information provider complete the request. Such a time period should be added to avoid undue

delays to accessing requested information. Finally, the last paragraph of Article 17 requires an information holder to deny access to requested information if the requester fails to complete its request within the time period set out in the Article or if it resubmits an incomplete request. As noted above, we recommend that the law also include a "duty to assist" provision that would, *inter alia*, require the information holder to liaise with the requester, if the requester is struggling to formulate a sufficiently clear request. Furthermore, in order to truly ensure free access to information, the law should indicate that this denial does not preclude the requester from resubmitting a request.

An information holder who decides to extend the deadline for providing access to requested information under Article 18 should have to inform the requester *prior* to the expiration of the deadline set out in Article 17 and should be required to estimate the length of the maximum 30-day extension. This would allow the requester to know when he/she can expect to receive the requested information.

The Draft Law's provisions on costs are in line with international standards in that only the material costs of receiving the information should be paid. It would perhaps be preferable if the rate for copies was not left entirely to the discretion of each information holder, but if a maximum figure was established centrally, for example by the National Commission for Free Access to Information (hereinafter "the Commission"). It should be at the discretion of the information holders to waive charges, particularly if the administrative costs of collecting and processing small fees would be more than the monies recuperated. Article 25 establishes that charges may be waived where information is personal or in the public interest. The former is welcome, the latter will be difficult to apply as it will require a subjective assessment of whether information is in the public interest to be made for each and every release, which could slow down the release of information. We recommend that the law only establish a mandatory fee-waiver for individuals who request their own personal information.

### D. Appeals Against Refusals/Failure to Provide Information

Article 21 correctly requires the information holder to inform the requester that it will respond positively to the request. Neither Article 21 nor Article 24, which deals with the denial of information requests, require the information holder to provide the same notification to the requester in case of denial. The Draft Law should specifically require the information holder to do so and to state precisely the grounds for the denial with reference to the relevant provisions of the law (Articles 7 and 9, and other grounds if they are retained).

Pursuant to Article 27, a requester may appeal both the decision of the information holder and of the Commission. Although the Article specifically provides that members of the Commission must be autonomous and independent, this may not be the case in fact for two reasons. The first is the fact that the "administrative, expert and technical duties of the Commission" will be performed by the Ministry of Justice. This raises some concerns as to the actual independence of the Commission. It may be advisable to create certain safeguards to truly ensure the Commission's independence. Second, the Draft Law provides that members of the Commission may be discharged by Parliament without specifying any grounds for such a dismissal. To ensure the independence of the Commission from political pressure, clearly identified grounds for dismissal should be specified. In addition, a member of the Commission may be discharged if "he/she has been working contrary to the provisions of the present Law." The Draft Law should indicate who will make this determination.

Finally, to ensure a speedy and inexpensive review process, the Draft Law should indicate a time frame in which the Commission should render its decision.

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